

United States District Court, Eastern District of Wisconsin

Name of Assigned Judge or Magistrate Judge	Philip G. Reinhard	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	08 CR 84 07 C 795	DATE	9/10/2009
CASE TITLE	U.S.A. vs. John Miller		

DOCKET ENTRY TEXT:

John Miller, having filed a “motion to the court under extraordinary circumstance Rule 60(b),” the court enters the ruling below.

Philip G. Reinhard

■ [For further details see text below.]

Notices mailed by Judicial staff.

STATEMENT

John Miller, a federal prisoner, filed a “motion to the court under extraordinary circumstance Rule 60(b).” Previously, Miller filed two motions entitled “Defective Indictment Motion” and “Affidavit of John Miller” (considered and docketed as a motion), which this court advised Miller would be characterized as a motion under 28 U.S.C. § 2255, warning Miller of the potential consequences of such a characterization, and giving Miller 30 days to either withdraw the motion, amend it, or proceed with it as is. See Minute Order of August 17, 2009. In Miller’s present motion he states that he “does not want to amend [that] motion pursuant to 28 U.S.C. § 2255 at this time or withdraw [that] motion.” Rather, Miller states that he wants to proceed on both motions.

The court, in light of Miller’s decision to neither amend nor withdraw his original motion, will now characterize and consider that motion as one under § 2255. Further, as explained to Miller in the August 17, 2009, order, the government is given 60 days to file its response, and Miller is given 30 days thereafter to file any reply to the response.

As for the present motion, it too is one that may fairly be characterized as the functional equivalent of a motion under § 2255. See Melton v. United States, 359 F. 3d 855 (7th Cir. 2004). Because Miller already has a pending § 2255 motion, the court will consider the most recent motion as an amended § 2255 motion which will include the contentions of the original § 2255 motion. The court does so notwithstanding Miller’s assertion to the contrary.¹ The government is to respond to the contentions in the § 2255 motion as amended.

1. The court notes that if it did not consider the § 2255 motion as an amended motion, it would be compelled to deny it as it would be an improper second or successive such motion. See 28 U.S.C. § 2255(h).